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Pembinaan Juta Mekar Sdn Bhd v Sap Holdings Bhd (previously known as Shah Alam Properties Bhd) & Anor

HIGH COURT (SHAH ALAM) — SUIT NO MT3-22–617 OF 2008
SEE MEE CHUN J
14 APRIL 2014

Contract — Privity — Building contract — Defendants arranged with main contractor to take over responsibility for paying plaintiff subcontractor for work done — Whether payment arrangement coupled with giving of instructions and other conduct showed contractual relationship existed between plaintiff and defendant — Whether plaintiff adduced sufficient documentary evidence to support claims — Whether much of plaintiff's evidence on loss and damages unrebutted

The second defendant ('D2') had awarded two contracts ('Phase 3A and Phase 3B') for the construction of town houses and terrace houses to a company ('Perangsang') which, in turn, appointed the plaintiff as subcontractor for the project. The plaintiff's instant claim against the defendants for loss and expenses and monies payable in respect of variation orders, progress claim and retention sum was on the premise either or both of the defendants had taken over Perangsang's responsibility to pay the plaintiff for work done. The plaintiff claimed the defendants by their conduct represented they had a contractual relationship with the plaintiff. They had also paid the plaintiff on several interim certificates in respect of work done on the project. The defendants denied privity of contract with the plaintiff and claimed the payments they made were merely on Perangsang's behalf on a temporary basis and at no time did they agree to assume Perangsang's liabilities in respect of the project.

Held, allowing the claim:

(1) The evidence showed there was a contractual relationship between the plaintiff and the defendants. The parties had arranged for D1 to directly pay the plaintiff for future interim progress payments and payments due on variation works. After the arrangement was agreed upon, D1 and D2 took steps to pay the plaintiff as was evident from the several payment vouchers over a period of two years. The arrangement was therefore not temporary and the defendant was not at liberty to discontinue making payments due to the plaintiff under the project. There was a contractual arrangement to pay and the letters between the plaintiff and the defendants, instructions from the defendants and the other consultants, attendance at meetings and the direct payment arrangement all

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cumulatively showed there was a contractual relationship between the plaintiff and the defendants (see paras 8, 9, 10 & 14).

(2) The allegation of non-completion and termination of the Phase 3A contract was never pleaded. Nor was the contention that the Phase 3A was an entire contract. Parties were bound by their pleadings. The evidence showed Phase 3B was fully completed. The absence of a final certificate in the instant case did not make the plaintiff's claim premature and it was for the court to consider the circumstances under which the final certificate was not issued (see paras 16, 18 & 21).

(3) There was sufficient evidence in the form of the QS' reports and various other supporting documents to support the plaintiff's claims. The QS was not challenged on the basis of his assessment in the reports. The only challenge was on the extension of time No 4 and Certificate No 41 for Phase 3A and Certificate No 34 for Phase 3B. There was no challenge on each specific head of claim. The court therefore made the appropriate assessment on the claims based on the QS' reports and the supporting documents and the absence of challenge on the evidence adduced (see para 38).

[Bahasa Malaysia summary

Defendan kedua ('D2') telah mengawardkan kedua-dua kontrak ('Fasa 3A dan Fasa 3B') untuk pembinaan rumah-rumah bandar dan rumah teres untuk syarikat ('Perangsang') yang mana kemudiannya melantik plaintif sebagai subkontraktor untuk projek tersebut. Tuntutan plaintif ini terhadap defendan-defendan untuk kerugian dan pembelanjaan dan wang yang dibayar balik berkaitan perintah pelbagai, tuntutan kemajuan dan jumlah tahanan adalah berdasarkan sekiranya sama ada atau kedua-dua defendan mengambil alih tanggungjawab Perangsang untuk membayar plaintif untuk kerja yang telah siap. Plaintif mendakwa defendan-defendan melalui tindakan mereka melambangkan mereka mempunyai hubungan kontraktual dengan plaintif. Mereka juga membayar plaintif atas beberapa sijil interim berkaitan kerja yang telah siap bagi projek tersebut. Defendan-defendan menafikan priviti kontrak dengan plaintif dan menuntut bayaran-bayaran yang dibuat oleh mereka hanya ke atas pihak Perangsang atas asas sementara dan tidak pada bila-bila masa mereka bersetuju untuk menanggung liabiliti Perangsang berkaitan projek tersebut.

Diputuskan, membenarkan tuntutan:

(1) Keterangan menunjukkan terdapat hubungan kontraktual di antara plaintif dan defendan-defendan. Pihak-pihak telah mengatur untuk D1 membayar terus kepada plaintif untuk bayaran kemajuan interim masa hadapan dan bayaran-bayaran yang kena dibayar atas kerja-kerja pelbagai. Selepas pengaturan tersebut dipersetujui, D1 dan D2

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mengambil langkah-langkah untuk membayar plaintif seperti yang jelas daripada beberapa baucar bayaran di atas tempoh masa dua tahun. Pengaturan oleh itu adalah bukan sementara dan defendan bukan bebas untuk tidak meneruskan membuat bayaran yang kena dibayar kepada plaintif di bawah projek tersebut. Terdapat pengaturan kontraktual untuk membayar dan surat-surat di antara plaintif dan defendan-defendan, arahan daripada defendan-defendan dan pakar runding-pakar runding yang hadir di mesyuarat dan pengaturan bayaran terus kesemuanya secara kumulatif menunjukkan terdapat hubungan kontraktual di antara plaintif dan defendan-defendan (lihat perenggan 8, 9, 10 & 14).

(2) Dakwaan tidak siap dan penamatan kontrak Fasa 3A tidak pernah diplidkan. Juga tiada hujahan bahawa Fasa 3A adalah kontrak keseluruhannya. Pihak-pihak terikat dengan pliding mereka. Keterangan menunjukkan Fasa 3B siap keseluruhannya. Ketiadaan sijil muktamad dalam kes ini tidak membuat tuntutan plaintif pramatang dan adalah untuk mahkamah mempertimbangkan keadaan di mana sijil muktamad tidak dikeluarkan (lihat perenggan 16, 18 & 21).

(3) Terdapat keterangan yang mencukupi dalam bentuk laporan QS dan pelbagai dokumen menyokong yang lain untuk menyokong tuntutan plaintif. QS tersebut tidak dicabar atas dasar taksirannya dalam laporan. Satu-satunya bantahan adalah atas pelanjutan masa No 4 dan Sijil No 41 untuk Fasa 3A dan Sijil No 34 untuk Fasa 3B. Tidak terdapat bantahan atas setiap kepala tuntutan spesifik. Mahkamah oleh itu membuat taksiran yang wajar atas tuntutan tersebut berdasarkan laporan QS dan dokumen menyokong dan ketiadaan bantahan ke atas keterangan dikemukakan (lihat perenggan 38).]

Notes

For cases on building contract, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5841–5843.

Cases referred to

JKP Sdn Bhd v PPH Development (M) Sdn Bhd and another appeal [2007] 6 MLJ 239; [2007] 3 CLJ 621, CA (refd)

Lum Sow Kuen v Chuah Choong Heong & Ors [1998] MLJU 39; [1998] 4 CLJ Supp 161, HC (refd)

Neale v Richardson [1938] 1 All ER 753, CA (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (distd)

Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31; [2004] 1 CLJ 532, CA (refd)

Wong Ho Enterprise Sdn Bhd & Ors v Tiong Hoo Teck [2008] 3 MLJ 321, CA (consd)

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CC Choo (CC Choo, Hazila & Teong) for the plaintiff.
K Revathy (Rastam Singa & Co) for the defendant.

See Mee Chun J:

[1] Two contract works for the construction of town houses (Phase 3A) and terrace houses (Phase 3B) at Templar Park Resort ('Phase 3A and Phase 3B to be collectively referred to as the project') were awarded by D2 to Perangsang International Sdn Bhd ('Perangsang'). Perangsang in turn appointed the plaintiff as subcontractor for the project. This is a claim by the plaintiff against D1 and D2 essentially for loss and expenses and other heads of claim in respect of the project. The claim is premised on D1 and/or D2 having taking over the responsibility for payment of work beginning with Certificate No 16 for Phase 3A and Certificate No 15 for Phase 3B. D1 and/or D2 had effected payments for the work done in respect of Interim Certificates No 16–41 for Phase 3A and Interim Certificates No 14–33 for Phase 3B. The plaintiff further states in the course of construction of the project the defendants had either jointly or separately represented or by conduct that there was a direct contractual relationship. The representation or conduct was in the form of meetings and instructions. The defendants state at the material time they had no knowledge of the plaintiff's appointment as subcontractor. The thrust of their defence is no privity of contract between them and the plaintiff as whatever contract was between Perangsang and the plaintiff. Any purported payment arrangement was effected on Perangsang's behalf and at no time did the defendants ever agree to assume the liabilities of Perangsang in respect of the project.

[2] The witnesses for the plaintiff were Mr Wong Chew Kim (PW1, director and shareholder of the plaintiff, witness statements marked as P1 and P1A), Encik Muhammad Roslan bin Abu Samah (PW2, assistant general manager of Perangsang from 1998–2003), Encik Ahmed Azhar Merican Muhammad Rouse (PW3, quantity surveyor for the project) and Encik Harris Zamzairee bin Hj Nashoha (PW4, architect for the project). The defendants had one witness Encik Md Hidzir bin Zabidi (DW1, senior manager, Planning and Development, Kumpulan Hartanah Selangor Bhd, witness statement marked as D1). Although PW2 was sworn in no evidence was taken from him. DW1 stated he had the authority to testify on the defendants behalf as the defendants are the subsidiaries of Kumpulan Hartanah Selangor Bhd.

[3] At the outset it is clear there was no contract between the plaintiff and the defendants. The contract for the project was between D2 and Perangsang and the subcontract between Perangsang and the plaintiff.

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A PAYMENT ARRANGEMENT

[4] The letters in relation to the payment arrangement are set out below:

(a) letter dated 6 September 2002 from Perangsang to D1 (B1 94–95). This B was with regard to Perangsang's downsizing exercise which was to take effect on 1 September 2002. In para 3.0 is stated:

> With our diminutive organization we thus write to seek your consent on our intention to assign both contracts above after less PISB's profit to our subcontractor on site, Pembinaan Juta Mekar Sdn Bhd;

C

(b) letter dated 12 September 2002 from D1 to Perangsang (B1 4):

> This was D2's reply to Perangsang's letter of 6-9-2002 and stated — '... we are not agreeable to the proposed assignment.
>
> D Taking into account the present situation a direct payment proposal may be a suitable alternative. For this, your consent will be necessary';

(c) letter dated 23 September2002 from Perangsang to D1 and copied to the plaintiff (B1 101–102). In this letter Perangsang set out what had E been paid to date under Phase 3A and 3B and the balance of contract sum. In para 1.2 is stated:

> SAPHB and PISB agreed that this future interim progress payment due to PISB, RM13,908.16 and any other payment derive from variations of contract shall be paid directly from SAPHB to Messrs. Pembinaan Juta Mekar F Sdn Bhd accordingly.

[5] PISB refers to Perangsang and SAPHB to D1.

G **[6]** Perangsang wrote to the plaintiff on 18 September 2002 (B1 96–100) and obtained its agreement on the 'balance of contract ie future interim payments due to PISB from the employer Templer Park Golf & Resort Berhad (TPGR) ... be paid directly to Pembinaan Juta Mekar Sdn Bhd by TPGR'.

H **[7]** PW1 stated there was no contract between the plaintiff and the defendants but there had been an agreement by the defendants to pay directly to the plaintiff. This together with letters, instructions and meetings attended showed the existence of a contractual relationship with the defendants. DW1 stated there was no contractual basis to the defendants relationship with the I plaintiff and they were only liaising with the plaintiff on Perangsang's behalf in order to assist Perangsang. The assistance was temporary in nature to financially assist Perangsang. The defendants had never agreed to take over Perangsang's liability as main contractor and the payment arrangement was an internal arrangement without any legal and/or binding effect.

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[8] The words 'direct payment proposal' in letter of 12 September 2002 and 'future interim progress payment due to PISB, RM13,908.16 and any other payment derive from variations of contract shall be paid directly from SAPHB to Messrs Pembinaan Juta Mekar Sdn Bhd accordingly' in letter of 23 September 2002 must necessarily mean there was an arrangement by D1 for future payments to be made directly to the plaintiff. Arising from this Perangsang had in letter dated 18 September 2002 obtained the plaintiff's approval that future payments due from the project owner D2 be paid direct to the plaintiff. This would be in consonance with PW1's evidence that the plaintiff had no contract with the defendants but that the defendants had agreed to directly pay the plaintiff.

[9] It was submitted DW1's testimony on the nature of the arrangement such as temporary assistance, financially assist Perangsang, never agreed to take over Perangsang's liability as main contractor and internal arrangement was not pleaded. It was only pleaded in paras 14 of both the defence of the defendants 'tidak wujud sebarang hubungan kontrak'. DW1's statements are evidence towards the fact of there being no contractual relationship. His evidence can therefore be considered by the court. However in the letters dated 12 September 2002 and 23 September 2002 dealing with the payment arrangement the assistance being temporary in nature and an internal arrangement were not mentioned. After the arrangement was agreed upon D1 and D2 took steps to pay the plaintiff as evident from the payment vouchers in B1 19–25 (by D1) and B1 26–42 (by D2) for Phase 3A and B1 43–44 (by D1) and B1 45–61 (by D2) for Phase 3B. The duration of payment was from 31 October 2002 by D1 and 16 September 2002 by D2 until 24 December 2004 in which DW1 signed a memo recommending payment (pp 198–203 of the notes of evidence). DW1 had explained in re-examination it was temporary as they were waiting at any time for Perangsang to say stop the direct payment (p 249 of the notes of evidence). Be that as it may this was a good two years for payments to have been made and would not be temporary. On it being an internal arrangement DW1 had agreed the payments were paid to the plaintiff so the impact of the arrangement could not have been internal as it was not confined to only the defendants and Perangsang. Further the letter dated 23 September 2002 from Perangsang to D1 where both had come to an agreement on the direct payment was copied to the plaintiff.

[10] This direct payment cannot possibly mean the defendant was at liberty to discontinue making any payments due under the project to the plaintiff when they had been paying so for about two years. There was a contractual arrangement to pay.

[11] The defendants had relied on the evidence of PW3 and PW4 who when asked who was to pay the plaintiff under the subcontract said it would be

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Perangsang and that PW4 had no knowledge of the direct payment to show there was no contractual relationship between the plaintiff and the defendants. The evidence of PW3 and PW4 that Perangsang has to pay the plaintiff is only correct if there had been no direct payment arrangement. PW4 not being aware of the direct payment arrangement does not necessarily mean there was no contractual relationship between the plaintiff and the defendants.

LETTERS, INSTRUCTIONS AND MEETINGS

[12] In P1 PW1 referred to a series of letters it wrote directly to D1 (para 19), letters written by the defendants to the plaintiff (para 20) and letters from the architect to the plaintiff (para 21). In para 2.2 of P1(a) PW1 referred to additional documents in the form of letters from D1 and Hartanah Selangor (C), direct instructions from architect and planner (D), direct instructions from other consultants (E) and letters of complaint seeking payment (H). According to PW1 all these together with the payment already made show a contractual relationship. It was contended by the plaintiff counsel the evidence of PW1 on letters, instructions and meetings attended were not rebutted by the defendants and that failure to cross-examine or challenge PW1 witness statement and documentary evidence tantamount to an acceptance of PW1 evidence. The cases of *Lum Sow Kuen v Chuah Choong Heong & Ors* [1998] MLJU 39; [1998] 4 CLJ Supp 161 and *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31; [2004] 1 CLJ 532 were referred.

[13] In this regard PW1 was cross-examined and it was put to him he attended as an observer in meetings called to which he disagreed. On the defendants' letter to the plaintiff to apply for electricity and water DW1 said this was to assist in the project. DW1 also stated the memos he wrote regarding payment was only to recommend and not approve. DW1 also stated they had not objected to the plaintiff's letters to the defendants as they had no relationship with the plaintiff. Hence there was an attempt to challenge PW1 evidence through cross-examination and the evidence of DW1. As to whether PW1 attended as an observer that fact does not appear from the letters calling for meetings. The letter to the plaintiff on utilities does not indicate this was in the form of assistance. The plaintiff's letters to the defendants related to late payment and although DW1 offered a reason for not replying this does not negate the letters were written pursuant to the direct payment arrangement.

[14] The letters, instructions from the defendants and the other consultants and attendance at meetings together with the direct payment arrangement show there was a contractual relationship between the plaintiff and the defendants.

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[15] The case of *JKP Sdn Bhd v PPH Development (M) Sdn Bhd and another appeal* [2007] 6 MLJ 239; [2007] 3 CLJ 621 supports the proposition there can be a liability to pay on a representation made. In that case the appellant had taken over the project and it was privatised to D1 who then appointed the respondent as main contractor. D1 was unable to pay the respondent and had to borrow from the appellant. The money was released direct to the respondent. By the time when Phase 1 of the project was substantially completed D1 could not on the interim certificates. The respondent could have terminated the agreement for breach but continued on due to a representation. The representation was for the appellant to the respondent it would the respondent and the respondent's subcontractor for all work and materials supplied. There the court forced a representation to have been made upon which liability could be imputed.

COMPLETION OF WORK

[16] The defendants say they are not liable to pay as the project was not completed. It was submitted by the defendants counsel PW1 had agreed the project was not completed. That was not PW1 evidence. The evidence as recorded shows PW1 had stated Phase 3A was not completed and Phase 3B was as there was a certificate of fitness in B3a 11 (pp 56–57 of the notes of evidence). Accordingly the CPC dated 28 October 2003 certifying practical completion on 23 October 2003 along with DW1's memo dated 19 July 2004 (B1 16) recommending payment for Phase 3B showing the percentage of completion to be 100% shows Phase 3B to be completed.

[17] The defendant further says Phase 3A was terminated by D2 vide letter of termination dated 25 February 2005. DW1 agreed in cross-examination the termination was out of time but not invalid. The letter was signed by one director Tengku Ab Aziz Tengku Mahmud who from the company search records in B4 was not listed as a director. In re-examination DW1 stated the search was dated 2007 and he would not know if during 2005 the list of directors is different. Hence there is no evidence the letter of termination for Phase 3A is invalid for being signed by someone who was not a director.

[18] However non-completion and termination of Phase 3A was never pleaded. It is trite law parties are bound by their pleadings. The submission of Phase 3A being an entire contract is not tenable as this issue was also not pleaded nor raised in trial.

NO FINAL CERTIFICATE

[19] In this instant case there was no final certificate issued. It was submitted on the authority of *Wong Ho Enterprise Sdn Bhd & Ors v Tiong Hoo Teck* [2008]

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3 MLJ 321 there had been no final certificate issued thereby rendering the plaintiff's claim premature. It is my considered view *Wong Ho Enterprise* was considered on a different footing relating to an injunction and at p 324 and it was stated:

> ... pending the final account being finalised and approved ... the plaintiff's claim is premature and this caused uncertainty to the very cause of action mounted by the plaintiff. On this ground alone we are of the view that the learned judge is wrong in granting the injunction.

and at p 325:

> ... the defendants have a good defence: that payment could not be due when the approved final sum has yet to be determined ... The defendants should not at this juncture be so harshly treated with a mareva injunction slapped on them.

[20] I prefer the submission of the plaintiff's counsel with reference to *Hudson's Building and Engineering Contacts* (11th Ed), Vol 1 and *Neale v Richardson* [1938] 1 All ER 753 that a failure or neglect to certify does not bar a claim. In *Hudson*'s at pp 791–792 it was stated:

> ... there are certain circumstances in which the necessity of obtaining a final certificate can be dispensed with, ...

and at *Neale* where at p 753 it is stated:

> It was the duty ... to decide whether the unissued certificate ought to have been issued. As he had failed to do this, the lack of a certificate was no bar to the plaintiff's right to recover the balance due.

[21] The absence of a final certificate does not make the claim premature. The court will have to consider the circumstances under which it was not issued.

QUANTUM

[22] In respect of Phase 3A and 3B it was PW3 the QS who prepared the report on the claims submitted by the plaintiff as in B2a 11–20 dated 9 April 2004 and B3a 49–56 dated 29 April 2004. PW3 stated his assessment for P's claims in Phase 3A was at B2a 17 and for Phase 3B at B3a 56. He was not cross-examined on the basis of assessment. The various heads of claim in Phase 3A are pursuant to the provisions of the subcontract between Perangsang and the plaintiff dated 23 July 2001 (B1 67–88) which adopted PAM form of contract. The various heads of claim in Phase 3B are pursuant to the letter of award dated 19 February 2001 (B1 89) where it was not disputed parties agreed to adopt PAM form of contract.

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Phase 3A

[23] The plaintiff's claim is for loss and expense, variation orders ('VO') and retention sum.

[24] PW4 the architect confirmed the retention sum as in Certificate No 41 (B1 217) to be RM815,400.39. It was put to him in cross-examination Certificate No 41 was not approved and certified to which he disagreed and that it had been endorsed. The retention sum can be released to the plaintiff. The claim for VOs are supported by the architects instructions and the relevant attachments in B2a 213, 237, 296, 322, 331, 363, 365, 373, 382, 399 and 400 and amount to RM2,603,257.21. There was no challenge to this evidence and as per *Lum Sow Kuen* and *Soon Peng Yam* the failure to cross-examine a witness on important aspects of his evidence must be treated as acceptance of that part of the evidence. The claim for loss and expense is broken up into preliminaries due to extension of time ('EOT'), office overheads due to prolongation costs, overdraft interest and adjustment of fluctuation on labour and materials due to EOT. This is explained by PW1 in paras 24–28 of P1. Again this part of the evidence on the loss other than that pertaining to EOT No 4 was not challenged and deemed accepted.

[25] As stated in *The Malaysian Standard Form of Building Contract* (PAM/ISM 69) by Vincent Powell-Smith at p 100:

> The term 'direct loss and/or expense' is a convenient shorthand which means what is recoverable is the equivalent of damages at common law according to the ordinary principles in section 74 of the Contracts Act 150, ie 'compensation for any loss or damage caused to him ... which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it ... Such compensation is not to be given for any remote and indirect loss or damage sustained ...'.

[26] The plaintiff's claim for loss and expense are those which arose naturally arose from the breach and/or which was reasonably within the knowledge of the defendants.

[27] On the EOT No 4 of 153 days there was no evidence it had been approved by the architect and why it had not been approved. PW4 had agreed the claim for loss and expenses arising from EOT No 4 was untenable. Thus the claim arising from EOT No 4 is not allowed and for preliminaries shall be reduced by 153 days and the amount allowed is RM47,256.70 (C1.3.4 (d), p 42 of the plaintiff submission), the claim on office overheads is RM281,688 as certified by QS in B2a 52 + the EOT No 2 of 61 days approved but not reflected in report of RM59,170 and the claim on adjustment of fluctuation reduced by 153 days which from B2a 130 is an amount of RM803,193.

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Phase 3B

[28] The plaintiff's claim is for loss and expense, VO, progress claim No 34 and retention sum.

The amount of retention sum of RM280,000 has been duly supported by the architect's interim certificate of payment No 33 dated 30 June 2004 (B1 287) and DW1's memo dated 19 July 2004 recommending the said amount (B1 16) and is therefore allowed.

[29] On the claim for VO PW1 in para 33 of P1 referred to QS report in B3a 52–56 and stated QS had approved RM866,704.70 (p 56) of which RM198,616.38 had been paid leaving RM688,088.32 outstanding. Although this evidence was not challenged QS had only recommended RM259,276.53 (p 61) and the detailed documents are in B3a 65–209. In para 33.4 PW1 stated the plaintiff had been paid RM198,616.38 and this amount shall therefore be deducted.

[30] In para 32 of P1 PW1 referred to the claim for loss and expense and the heading is for adjustment of fluctuation on labour and materials due to extension of construction period. This portion of his evidence is not as detailed for a similar claim for loss and expense for Phase 3A which the claim was neatly categorised into subheadings of preliminaries, office overheads, overdraft interest and adjustment of fluctuation on labour and materials. PW1 referred to B3a 1–41 which are his own documents. Looking at the QS report in particular at p 56 the relevant summary of assessment for preliminaries, office overheads, overdraft interest are RM394,605.80 + RM37,727.67 + RM175,094.70. This part of the QS report was not challenged.

[31] In relation to the progress claim No 34 PW3 stated it had not been certified. In cross-examination he was asked the reason for non-verification and his answer was:

> The most likely reason is that the project was coming to an end and probably has ended and actually we provisions, we have provisions in our contract conditions whereby we can certify these payments during the final periods.

(p 171 of the notes of evidence).

[32] It was put to him as the progress claim No 34 is yet to be certified and approved the plaintiff's claim under claim No 34 is untenable and premature to which he disagreed.

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[33] PW4 stated he could not say if the evaluation on claim No 34 had been completed as he had left the firm in 2005 and the plaintiff's claim was received on 30 May 2006. He stated as a 'professional I don't see any reason why this figure not being paid to the contractor who did the job' and that 'even though I left the company someone should evaluate this project'. In cross-examination he agreed for a party to make a claim, the claim has to be certified and approved by the architect. He agreed too he did not know why the architect company did not approve or assess the claim and it was his opinion that the architect should have approved. In re-examination as put by the judge:

Q: ... can that claim stand if it's not verified or certified ...

A: The claim stand.

Q: We can bayar?

A: Yes.

Q: Can bayar? Without the certificate verified and certified?

A: Oh no, cannot.

[34] The reason why claim No 34 was not verified and certified is not clear. What came out from the evidence is that without being verified and certified the claim cannot be paid. The reason could be the contract was coming to an end. There was no evidence the work had not been done. Thus the lack of verification and certification is no bar to the claim under claim No 34. As to the amount of claim, it was argued that in Q & A 34 of P1 an amount of RM1,323,081.35 was claimed which differs from the amount of RM715,653.18 originally pleaded and amounted to an amendment of pleadings:

Q: The Plaintiff's claim under progress claim no 34 stated an amount of RM1,323,081.35 differs from the amount of RM715,653.18 which is pleaded in the statement of claim?

A: The detailed computation is found at p2 of Jilid 3b Bahagian C. I shall explain the basis of how the amount of RM715,653.18 under the progress claim no 34 during the trial of this action.

[35] There was no attempt to amend the amount claimed as it was always RM715,653.18. Although PW1 did not explain this amount in trial he had in his preceeding statement referred to B3a 2 which is the summary of claim at the amount of RM715,653.18. He had also referred to the entire supporting documents in B3a 3–339. This is in his witness statement and there was no cross-examination thereby rendering this evidence accepted.

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A PROOF ON QUANTUM

[36] The defendants had referred to the case of *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 on lack of proof. The following remarks were relied on:

B

> ... the statement of account ... are by themselves not sufficient to establish the respondent's claim for damages' (p 237D);
>
> ... the nature of an audited account in this instant case ... is nothing more than general conclusion or results from the books or account or record books. (p 240);
>
> C ... the respondent failed to prove the contents and show how the contents were related to the alleged breach of the agreement. No evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered there from flowing from the breach (p 237F); and
>
> D The respondent's failure to produce or tender the account books or the necessary support documents upon which the audited statements were based is fatal to his claim for damages. .... (p 237G).

[37] It was submitted the plaintiff's claim was based on a simple E mathematical calculation based on a wrong premise.

[38] In allowing this instant claim this court is not departing from the principles in *Sony Electronics*. Here there was sufficient evidence in the form of QS report and the various supporting documents were produced. PW3 the QS F was not challenged on the basis of his assessment in the reports. In fact the only challenge was on EOT No 4 and Certificate No 41 for Phase 3A and Certificate No 34 for Phase 3B. There was no challenge on each specific head of claim. This case can be distinguished from *Sony Electronics* and this court has made the appropriate assessment based on QS report and the supporting documents G and the absence of a challenge on the evidence.

CONCLUSION

[39] For Phase 3A the plaintiff's claim for VO of RM3,256,503.21 and H retention sum of RM815,400.39 is allowed. The loss and expense claim is reduced by 153 days. For preliminaries it is RM47,256.70, overhead expenses is RM281,688 + RM59,170 and adjustment of fluctuation is RM1,891,833.55 - RM803,193. Overdraft interest of RM187,036.90 is I allowed.

[40] For Phase 3B the plaintiff's claim for VO of RM259,276.53 is allowed, claim for loss of expenses of RM394,605.80 + RM37,727.67 + RM175,094.70 is allowed. An amount of RM198,616.38 is deducted as the

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plaintiff says this has been paid. Progress claim No 34 of RM715,653.18 and retention sum of RM280,000 is allowed.

[41] Interest of 5% from date of filing till date of settlement. Costs to the plaintiff.

Claim allowed.

Reported by Ashok Kumar